(4)

No. 05-962

In the Supreme Court of the United States

MARK HOUK, Warden,

Petitioner,

v.

GREGORY LOTT, *et al.*,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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CAPITAL CASE

QUESTION PRESENTED

Does Schlup v. Delo, 513 U.S. 298 (1995), require habeas petitioners who assert innocence after a constitutionally tainted trial to waive attorney-client privilege and work-product protections, thus permitting opposing counsel to depose the habeas petitioner's previous counsel and obtain their files to look for facts that might help them defend against the innocence claim?

TABLE OF CONTENTS

QUESTION PRESENTED I

TABLE OF CONTENTS II

TABLE OF AUTHORITIES III

1. Statement of the case 1

2. Reasons for declining jurisdiction 4

2.1 There is no support in doctrine or history for Petitioner's novel contention that a habeas petitioner pursuing an innocence claim involving Schlup implicitly and completely waives attorney-client privilege and work-product protection 6

2.2 Neither Lott's successor habeas claim nor Schlup puts Lott's privileged information in play 9

2.3 Attorney-client privilege may be implicitly waived only in a narrow set of circumstances, none of which applies here 11

2.4 Relevance alone does not justify an exception to longstanding privilege protections 14

2.5 Work-product protected information may be accessed only in narrow circumstances, none of which applies here 17

2.6 Petitioner's "floodgates" argument opens the other way – if new privilege exceptions are recognized here, they will cut inroads across the legal landscape 18

CONCLUSION 21

TABLE OF AUTHORITIES

CASES

Admiral Ins. Co. v. United States Dist. Ct., 881 F.2d 1486 (9th Cir. 1989) 16

Bernardo v. Commissioner, 104 T.C. 677 (1995) 13

Bittaker v. Woodford, 331 F.3d 715 (9th Cir. 2003) 4, 12, 13

Brady v. Maryland, 373 U.S. 83 (1963) ..... passim

Calderon v. Thompson, 523 U.S. 538 (1998) 8

Conkling v. Turner, 883 F.2d 431 (5th Cir. 1989) 14

Doe v. Menefee, 391 F.3d 147 (2d Cir. 2004) 10, 11

Fleet Nat'l Bank v. Tonneson & Co., 150 F.R.D. 10 (D. Mass. 1993) 15

Hamilton v. Miller, 292 F. Supp. 2d 437 (E.D.N.Y. 2003) 11

Hearn v. Rhay, 68 F.R.D. 574 (E.D. Wash. 1975) 14

Herrera v. Collins, 506 U.S. 390 (1993) 5

Hickman v. Taylor, 329 U.S. 495 (1947) 7

High Tech Commc'ns, Inc. v. Panasonic Co., 1995-1 Trade Cas. (CCH) (E.D. La. 1995) 16

Hubbard v. Pinchak, 378 F.3d 333 (3d Cir. 2004) 8

In re Keeper of Records, 348 F.3d 16 (1st Cir. 2003) 14

In re von Bulow, 828 F.2d 94 (2nd Cir. 1987) 14

KW Muth Co. v. Bing-Lear Mfg. Group, 219 F.R.D. 554 (E.D. Mich. 2003) 15

Penson v. Ohio, 488 U.S. 75 (1988) 7

Rhone-Poulenc Rorer Inc. v. Home Indem. Co., 32 F.3d 851 (3rd Cir. 1994) 16

Schlup v. Delo, 513 U.S. 298 (1995) ..... passim

Sedco Int'l S.A. v. Cory, 683 F.2d 1201 (8th Cir. 1982) 14

Souter v. Jones, 395 F.3d 577 (6th Cir. 2005) 8

Standard Chartered Bank PLC v. Ayala Int'l Holdings (U.S.) Inc., 111 F.R.D. 76 (S.D.N.Y. 1986) 15

Synalloy Corp. v. Gray, 142 F.R.D. 266 (D. Del. 1992) 14

THK America, Inc. v. NSK, Ltd., 917 F. Supp. 563 (N.D. Ill. 1996) 16

Toledo Edison Co. v. G A Technologies, Inc., 847 F.2d 335 (6th Cir. 1988) 17, 18

Uniroyal Chem. Co. v. Syngenta Crop Protection, 224 F.R.D. 53 (D. Conn. 2004) 13
United States ex rel. Bell v. Pierson, 267 F.3d 544 (7th Cir. 2001) 8
United States v. Bilzerian, 926 F.2d 1285 (2nd Cir. 1991) 14, 15
United States v. Bousley, 523 U.S. 614 (1998) 10
United States v. Cervini, 379 F.3d 987 (9th Cir. 2004) 8
United States v. Nobles, 422 U.S. 225 (1975) 17
United States v. White, 887 F.2d 267 (D.C. Cir. 1989) 13
Upjohn Co. v. United States, 449 U.S. 383 (1981) 4
WLIG-TV Inc. v. Cablevision System Corp., 879 F. Supp. 229 (E.D.N.Y. 1994) 14

CONSTITUTIONAL PROVISIONS

28 U.S.C. § 2244 ..... 6, 12
U.S. Const. V amend. 3
U.S. Const. VI amend. 2

RULES

Fed. R. Civ. P. 26 ..... 7, 15, 17

1. STATEMENT OF THE CASE.

The Sixth Circuit stopped enforcement of a privilege-piercing discovery order, finding that "the District Court applie[d] implied waiver in a completely new context." Petitioner's App. p. 14. The appellate court determined that, "There is no way to affirm the District Court's ruling without abandoning centuries of jurisprudence concerning the scope of the attorney-client privilege and endangering the full and frank communication between clients and attorneys." Petitioner's App. p. 18.

The discovery order completely exposed privileged material. "The District Court authorized the warden to depose and seek production of documents from Lott's trial counsel. Specifically, the Court ruled that Lott's trial counsel must provide any relevant information he has concerning whether Lott is guilty of the murder and whether Lott confessed the murder to the police." Petitioner's App. p. 2.

The facts underlying the Sixth Circuit's privilege-protecting mandamus order arise from Lott's successor habeas claim that he is innocent based on facts hidden at trial in violation of Brady v. Maryland, 373 U.S. 83 (1963). The Sixth Circuit granted Lott's application to file a successor habeas petition, finding that "Lott has made a prima facie showing that the prosecutor in his original trial both withheld important evidence from the court and made statements to the court that were directly contradicted by the evidence withheld from the defendant." Petitioner's App. p. 2. The court concluded its decision granting Lott's successor habeas application by saying:

> Taking the evidence as a whole, we conclude that petitioner's application makes a prima facie showing of constitutional Brady error that, if proved in the district court, may be sufficient to cause the fact finder to reach the conclusion beyond a

> reasonable doubt that the petitioner was not guilty of premeditatedly murdering the victim.
>
> Obviously, the egregious prosecutorial misconduct alleged here, if proved, must be deterred. So long as we value the rule of law, such conduct, if it occurred, cannot be tolerated in any kind of case -- much less in death penalty cases.

Petitioner's App. pp. 87-88.

The central Brady facts at issue in Lott's successor habeas include:

> Lott looks nothing like the very light complected, long straight-haired black man described by the victim as being his assailant, Respondent's App. pp. 48-49, 50-51, 67-68;
>
> The victim told police that he recognized his assailant from his barber shop, which was never disclosed to trial-level defense counsel – neither they nor, as far as Lott knows, the prosecution ever investigated this lead, Respondent's App. p. 69;
>
> Lott looks significantly different than the man drawn in a sketch by a key State witness, who years later admitted under oath (during a first-habeas deposition) that police fed her false information about phantom skin-lightening makeup to shore up her weak identification, Respondent's App. pp. 50-56, 87; and
>
> The victim did have reason to have lamp oil in his house, which exposes the prosecutor's false argument at trial that the perpetrator brought flammable liquid into the crime scene for the purpose of burning the victim, Respondent's App. pp. 49-50, 70, 77-86.

Additionally, Lott contends that a detective neither reliably nor credibly testified about an inculpating statement he claimed Lott made. The trial court suppressed the alleged confession because the detective violated Lott's Sixth Amendment right to counsel.

The district court granted discovery on the premise that Lott's innocence claim, based on facts withheld from him at trial in violation of Brady v. Maryland operated as an implied waiver of attorney-client privilege and work-product protections. Based on this unparalleled "implied waiver" analysis, the district court's discovery order stripped Lott of his attorney-client and work-product privileges. The order had six provisions implicating privilege:

(1) opposing counsel could depose Lott's trial counsel to ask what Lott said about the charged crimes and his interrogation, Petitioner's App. pp. 44-45;

(2) opposing counsel could depose Lott's first State post-conviction counsel to ask when he obtained law enforcement documents revealing Brady facts, and why he did not bring those facts to the State court's attention, Petitioner's App. p. 56;

(3) opposing counsel could depose Lott's first habeas counsel to ask why he did not include an innocence claim in Lott's first habeas petition, Petitioner's App. p. 56;

(4) opposing counsel could depose Lott to ask whether his trial lawyers had the Brady evidence, whether he was innocent, and what happened when he was interrogated, and, because Lott retained his Fifth Amendment rights, the court would "draw an adverse inference against him" if he exercised those rights during his deposition, Petitioner's App. pp. 53-54;

(5) Lott's successor habeas counsel had to give opposing counsel copies of any documents in Lott's trial counsel's file and Lott's first post-conviction counsel's file that contained "any information pertaining to Lott's actual innocence and Brady claims," and they "may not assert attorney-client privilege as grounds for withholding any documents related to Lott's culpability in McGrath's murder," Petitioner's App. pp. 57-58; and

(6) the custodian of deceased trial counsel Guiliani's records had to give the court any Lott-related files so the court could "conduct an *in camera* inspection of these documents and relinquish to the Petitioner any documents responsive to her request" to discover "information related to defending Lott's actual innocence and Brady claims." Petitioner's App. pp. 46-47.

Lott recognizes that his prior counsel would not be shielded from answering questions regarding the matters discussed in two affidavits regarding prior counsel that Lott tendered in support of his successor habeas petition. Respondent's App. pp. 71-72, 89-96. Lott agrees that his trial counsel could be deposed to determine whether the trial prosecutor disclosed the Brady evidence, Respondent's App. pp. 89-96 (Affidavit of Lott's trial counsel Jim Kersey, which Lott offered through Rule 7 in the district court, but its admission was denied when the order issued authorizing Kersey's deposition (see Petitioner's App. p. 62)). And Lott agrees that his first state post-conviction counsel could be deposed regarding when he obtained Brady evidence in

documents disclosed by the prosecuting and police agencies in response to public records requests made under Ohio law. See Respondent's App. 71-72. Lott also agrees that his privileges with respect to his first post-conviction are waived for the limited purpose of questioning first post-conviction counsel about the matters addressed in an affidavit submitted as an exhibit to his successor habeas petition; specifically, what legal rationale explains his decision not to present the facts in those records to an Ohio court. Id.

The Sixth Circuit found no justification for the privilege-piercing discovery order. It granted mandamus relief and "set aside those portions of the District Court's order which hold that Lott's assertion of actual innocence effects an implied waiver of the attorney-client privilege and those portions of the order directing discovery in accordance with that holding." Petitioner's App. p. 18.

2. REASONS FOR DECLINING JURISDICTION.

Privilege law is settled law.[1] The Sixth Circuit simply applied that law to correct a district court which departed from the usual course of centuries old privilege jurisprudence. Petitioner would have this Court reinstate a discovery order that reached the novel and unjustified conclusion that Lott's innocence claim cost him his attorney-client privilege and work-product protections.

The Sixth Circuit stopped the order's intrusion into territory both parties agree is privileged, correctly concluding that there was no justification for the discovery order's total breach of Lott's privileges.

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[1] For brevity, unless otherwise distinguished, Lott uses "privilege" to refer to both the attorney-client privilege and the work-product protection doctrine. As noted by the Sixth Circuit, "While our decision is couched in terms of the attorney-client privilege, it applies with equal force to the work product privilege. See Upjohn Co. v. United States, 449 U.S. 383, 400 (1981); Bittaker v. Woodford, 331 F.3d 715, 722 n.6 (9th Cir. 2003)." Petitioner's App. p. 3 n.1.

The district court's discovery order found an implied privilege waiver where none existed. Lott's claim that he is innocent under Schlup v. Delo, 513 U.S. 298 (1995), based on facts withheld from him at trial in violation of Brady v. Maryland, 373 U.S. 83 (1963), did not operate as an implied waiver of attorney-client or work-product privileges. Lott relies on Schlup, not Herrera v. Collins, 506 U.S. 390 (1993), to advance this claim because he had a constitutionally tainted trial. Petitioner's Question Presented misdirects the Court by relying in part on Herrera, which is not at issue in this case.

Neither Lott's claim nor his arguments in support put privileged matters at issue in such a way as to justify the privilege-piercing discovery order. He did not argue ineffective assistance of counsel. Nonetheless, the district court illogically likened Lott's Brady-innocence claim to an ineffective assistance of counsel claim in order to find an implied waiver where none exists. Petitioner's App. pp. 44-45.

Petitioner's four-part argument asks this Court to reinstate the district court's wayward discovery order. Petitioner's varied arguments advance two main contentions. First, because Lott's privileged information is probably relevant and might contain facts helpful to defend against an innocence claim, Petitioner is entitled to sort through Lott's privileged information. Second, Schlup silently created an exception to centuries old privilege law by allowing the government to fish through a habeas petitioner's privileged information whenever a Schlup-based innocence claim is raised.[2]

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[2] "By freeing district courts of the strictures of the rules of admissibility, the Schlup Court makes no suggestion that courts are likewise unbound by the rules of privilege. It can hardly be said that the Court would take such a large leap silently. The distinction between admissibility and privilege is no stranger to the Supreme Court or any other. Suspending the rules of admissibility while preserving the rules of privilege is not an unusual event." Petitioner's App. p. 16.

Petitioner is wrong on both counts. No court or party to this litigation has found a similar privilege-piercing discovery order; nor is there a case like the Sixth Circuit's order. It appears that no other circuit has ever been faced with a district court order that departed so radically from established privilege law. The Sixth Circuit reached the right decision. There is no reason for this Court to review the appellate court's routine application of settled privilege law to resolve a fact-intensive discovery dispute.

2.1 THERE IS NO SUPPORT IN DOCTRINE OR HISTORY FOR PETITIONER'S NOVEL CONTENTION THAT A HABEAS PETITIONER PURSUING AN INNOCENCE CLAIM INVOLVING SCHLUP IMPLICITLY AND COMPLETELY WAIVES ATTORNEY-CLIENT PRIVILEGE AND WORK-PRODUCT PROTECTION.

Given the settled history of privilege jurisprudence, the Sixth Circuit correctly quashed an aberrant discovery order that found a complete privilege waiver rooted solely in the fact Lott invoked Schlup to support his successor habeas innocence claim filed pursuant to 28 U.S.C. § 2244(b). Petitioner's arguments invite this Court to create a broad waiver of attorney-client privilege and work-product protection whenever a habeas petitioner asserts a claim of innocence. This position cannot be justified by the long-standing policies that undergird the rights of clients to converse freely with their attorneys; nor can it be supported by the well-developed doctrine of waiver of privilege. Accordingly, this Court should decline certiorari.

The Sixth Circuit used long settled law to reign in the privilege-piercing discovery order:

> The oldest of the privileges, the attorney-client privilege has been recognized since the reign of Queen Elizabeth. See, e.g., Hartford v. Lee, 21 Eng. Rep. 34 (Ch. 1577). And, as Wigmore notes, the privilege was virtually "unquestioned" even then. 8 J. Wigmore, Evidence § 2290, at 547 (3d ed. 1940). The attorney-client privilege encourages "'full and frank communication between attorneys and their clients and thereby promotes broader public interests in the observance of law and the administration of justice.'" Swidler & Berlin v. United States, 524 U.S. 399, 403 (1998) (quoting Upjohn Co. v. United States, 449 U.S. 383, 389 (1981)). As we have previously noted, "the privilege encourages clients to make full disclosure to their lawyers, and '[a] fully informed lawyer can more effectively serve his client.'" Reed v. Baxter, 134 F.3d 351, 356 (6th Cir. 1998).

Petitioner's App. p. 6.

Similarly, work product protection stems from an understanding that the "historical and the necessary way in which lawyers act within the framework of our system of jurisprudence to promote justice and to protect their clients' interests" demands that an attorney "prepare his legal theories and plan his strategy without undue and needless interference." Hickman v. Taylor, 329 U.S. 495, 511 (1947). Work-product is protected by Fed. R. Civ. P. 26(b), which neither the district court in its discovery order nor Petitioner in its certiorari petition cited, much less applied, to this case.[3]

"It is not hyperbole to suggest that the attorney-client privilege is a necessary foundation for the adversarial system of justice." Sixth Circuit Opinion, Petitioner's App. pp. 6-7. Petitioner's argument that privileges do not apply to innocence claims based on Schlup assaults the adversarial axiom underlying our justice system. "The paramount importance of vigorous representation follows from the nature of our adversarial system of justice. This system is premised on the well-tested principle that truth -- as well as fairness -- is 'best discovered by powerful statements on both sides of the question.'" Penson v. Ohio, 488 U.S. 75, 84 (1988) (citations omitted).

Petitioner is free to do what he can to muster "powerful statements" for his current cause. But the fact that Petitioner is cornered by the trial prosecutor's flagrant Brady violations does not vest him with the right to fish through Lott's privileged information in the hope he will find

[3] "The Rules of Civil Procedure define the scope of discovery as follows: 'Parties may obtain discovery regarding any mater, *not privileged*, that is relevant to the claim or defense of any party . . . .' Fed. R. Civ. P. 26(b)(1) (emphasis added). The Rules make clear that privileged material, even relevant privileged material, is not discoverable. There are no exceptions to these rules that would permit the discovery of privileged materials in this habeas proceeding." Sixth Circuit Opinion, Petitioner's App. p. 11.

something to fill in the gaping Brady hole. If Petitioner cannot find a way to fight Lott's claim without fishing through Lott's privileged information, that is because his case is weak, not because he has a lawful right to pierce privilege.

Barring Petitioner from accessing Lott's privileged information hardly empties his arsenal. By his own argument, Petitioner has facts and law to contest Lott's successor habeas claim. Without conceding the correctness of Petitioner's arguments, Lott notes that throughout his certiorari petition, Petitioner points to facts he believes refute Lott's innocence claim. Petitioner has access to the trial record; to the investigatory materials relied upon at Lott's criminal trial; and to the evidence Lott puts forth to assert his claim of innocence. All of this is standard fare when courts adjudicate a habeas argument that Schlup's innocence gateway excuses a defaulted claim. See e.g., Calderon v. Thompson, 523 U.S. 538, 560-66 (1998); Souter v. Jones, 395 F.3d 577, 592 (6th Cir. 2005); Hubbard v. Pinchak, 378 F.3d 333, 340 (3d Cir. 2004); United States v. Cervini, 379 F.3d 987, 992 (9th Cir. 2004); United States ex rel. Bell v. Pierson, 267 F.3d 544, 553-54 (7th Cir. 2001). If Petitioner thinks that these facts cannot counter those Lott found after his trial, that is because Petitioner's case now looks weak, with gaps exposed by the Brady material. Being in a difficult spot has never been a reason to permit a party to fish through his opponent's privilege information.

What Petitioner is really saying is that the evidence he has is not enough to contest Lott's claim. What Petitioner wants is a chance to pierce privilege to fish for a way around the Brady evidence that points to some other perpetrator; that would excuse the fact that the police coerced an eyewitness; that would forgive the fact that the trial prosecutor lied about the lamp oil; and that would overcome the lead detective's unreliable claim that Lott partially confessed. Ours

would be a very different judicial system if every advocate put in a tough spot by the evidence had a right to force open opposing counsel's files.

2.2 NEITHER LOTT'S SUCCESSOR HABEAS CLAIM NOR SCHLUP PUTS LOTT'S PRIVILEGED INFORMATION IN PLAY.

Petitioner argues that Schlup's rationale contains a silent conclusion that privilege law is breached when a habeas petitioner asserts innocence. The Sixth Circuit rejected this broad interpretation. "To be certain, the Schlup Court indicates that the rules of admissibility do not limit the evidence that can be considered by a court evaluating a claim of actual innocence. ... [But by] freeing district courts of the strictures of the rules of admissibility, the Schlup Court makes no suggestion that courts are likewise unbound by the rules of privilege." Petitioner's App. p. 16. The court distinguished privileged information from other information that, while its disclosure may be required, cannot be admitted against the disclosing party. "Privileged communications are not merely withheld from admission against the holder. Instead, the privilege operates to prevent the disclosure itself. In that way, privileges can be distinguished from other rules of admissibility...." Petitioner's App. p. 9 (citation omitted). The Sixth Circuit went on to say:

> There is no question that the attorney-client privilege remains applicable in habeas proceedings. "The rule with respect to privileges applies at *all* stages of *all* actions, cases, and proceedings." Fed. R. Evid. 1101(c) (emphasis added). The Rules of Evidence make it abundantly clear that the attorney-client privilege stands in all federal judicial proceedings, which would include habeas proceedings where petitioners assert actual innocence. The commentators make clear that the applicability of the privilege rules in all proceedings "means that privileges can apply even in situations where the other rules of evidence are not applicable." 31 Charles Alan Wright & Victor James Gold, Federal Practice and Procedure § 8076, at 618 (2000); see also id. at 614 ("The policy behind extending privilege law to all proceedings is that the values protected by privileges can be destroyed by permitting disclosure of privileged material in any judicial context.").

Petitioner's App. p. 10.

Petitioner's reading of Schlup is novel and wrong. But for the district court below, it appears that no other court has found that Schlup calls for a complete abandonment of privileges. Neither party nor any court involved in this litigation found a case where a court allowed attorney-client privilege to be pierced so that the State could look for information to rebut an innocence claim. Only a few courts have even considered any evidence put forth by the State that was outside of the record. In those cases, the evidence had not been ruled inadmissible under federal standards, like the privileged information at issue here should be.

In United States v. Bousley, 523 U.S. 614 (1998), this Court remanded to allow a petitioner to make a showing of innocence to avoid procedural default, saying that "the Government should be permitted to present any admissible evidence of petitioner's guilt even if that evidence was not presented during petitioner's plea colloquy...." Bousley, 523 U.S. at 624. Bousley cannot be read to support Petitioner's contention that the government can pierce privilege to fish for evidence of guilt.

In Doe v. Menefee, 391 F.3d 147 (2d Cir. 2004), the court considered hearsay evidence while analyzing an actual innocence claim without determining whether it would have been admissible at trial. Doe, 391 F.3d at 170. The court reasoned that Schlup permitted reviewing courts to examine all the evidence in the record, including evidence that might have been inadmissible at trial. Doe, 391 F.3d at 161-62. However, the court specifically found that the evidence at issue was reliable, and was the result of the investigation that resulted in Doe's conviction. Doe, 391 F.3d at 170.

The dissenting opinion in Doe took issue with the majority's contention that it could consider inadmissible evidence when evaluating a claim of actual innocence. Doe, 391 F.3d at 181-82 (Pooler, J., dissenting). Reading Schlup and Bousley together, the dissent reasoned that

the court should consider only admissible evidence when determining actual innocence cases. Doe, 391 F.3d at 181.

Even where a court has considered suppressed evidence when addressing an actual innocence claim, the evidence had been suppressed only on state law grounds and would have been admissible under federal law. Hamilton v. Miller, 292 F. Supp. 2d 437, 441-42 (E.D.N.Y. 2003). Petitioner's inculpatory statement had been suppressed because it was obtained in violation of New York law, although it did comply with federal standards. Hamilton, 292 F.3d at 441. However, even though the court noted that it could consider the suppressed statement, it also remarked that "[r]eliance on this evidence is, however, unnecessary in the instant case," and noted the "great weight of evidence against [Petitioner]" undermined his claim of actual innocence. Hamilton, 292 F.3d at 456.

While Doe and Hamilton sanctioned the use of evidence that may not have been admissible at trial, neither court relied on any evidence that had been obtained by the State after the petitioner had been convicted; and neither relied on evidence that would have been inadmissible under both federal and state law. Both federal and state law prohibit admitting privileged evidence.

Overall, the cases involving Schlup demonstrate a stable and reasonable application of this Court's decision. There are no controversies or conflicting opinions that support Petitioner's unique if not aberrant position; there are no problems that require this Court's attention.

This Court need not step in to solve a problem that does not exist.

2.3 ATTORNEY-CLIENT PRIVILEGE MAY BE IMPLICITLY WAIVED ONLY IN A NARROW SET OF CIRCUMSTANCES, NONE OF WHICH APPLIES HERE.

The Sixth Circuit found no basis for implying a waiver: "In the discovery order, the District Court did not rule that the attorney-client privilege was inapplicable. Instead, the District

Court found that through asserting a claim of innocence, Lott should be deemed to have 'waived' the privilege — clearly, a legal fiction if 'waiver' means a voluntary act." Petitioner's App. p. 11. The Sixth Circuit found "no case authority holding that a claim of actual innocence 'waives' the attorney-client privilege or similar privileges such as the doctor-patient and priest-penitent privilege." Petitioner's App. p. 1.

Lott did not claim ineffective assistance of counsel; he did not use privileged information as a sword to advance his claim. Lott's claim asserts innocence in the aftermath of a trial corrupted by Brady error. Lott contends that Schlup v. Delo, 513 U.S. 298 (1995), recognizes a cognizable claim of innocence based on a trial rendered unfair by constitutional error. The analytical focus should fall on the question whether, in light of the Brady evidence of innocence, any reasonable factfinder would have found Lott guilty of the underlying offense. 28 U.S.C. § 2244(b)(2)(B)(ii).

The Sixth Circuit correctly concluded that no waiver exception justifies the discovery Petitioner seeks:

> In this case, the District Court applies implied waiver in a completely new context. Rather than finding that Lott had put his attorney's performance or strategic decisions at issue and determining that he took the affirmative action to waive the privilege, the court finds waiver in Lott's assertion that the police invented the confession and in his assertion that he is innocent. Neither of Lott's assertions relate to what his attorney knew or did in this case. Instead, they are assertions about Lott's actions, i.e. whether he killed McGrath and whether he confessed to the killing to the police. We have not been able to discover a single case where a court has found that implied waiver applied in a similar fashion.

Petitioner's App. p. 14.

Under settled law, implied waivers are consistently construed narrowly. Courts in habeas proceedings "must impose a waiver no broader than needed to ensure the fairness of the proceedings before it." Bittaker v. Woodford, 331 F.3d 715, 720 (9th Cir. 2003). "A broad

waiver rule would no doubt inhibit the kind of frank attorney-client communications and vigorous investigation of all possible defenses that the attorney-client and work product privileges are designed to promote." Bittaker, 331 F.3d at 722. A broader waiver rule than the one Petitioner seeks cannot be imagined: once Schlup is invoked, all privilege protections fall by the wayside – nothing is out of bounds under Petitioner's definition of implied waiver.

There is no general principle that a litigant waives attorney-client privilege merely by asserting the correctness of his legal position. If such an exception existed, the privilege would be illusory during any litigation on the merits. To this end, courts have held that filing a complaint in Tax Court need not require taxpayers to disclose their attorneys' advice. See Bernardo v. Commissioner, 104 T.C. 677, 690-91 (1995). Litigants seeking to enforce contracts do not waive privilege, even though attorneys may have information as to the intended interpretation of contractual terms. See Uniroyal Chem. Co. v. Syngenta Crop Protection, 224 F.R.D. 53, 56 (D. Conn. 2004). And a criminal defendant does not waive privilege merely by denying criminal intent. United States v. White, 887 F.2d 267, 270 (D.C. Cir. 1989) ("A rule thus forfeiting the privilege upon denial of *mens rea* would deter individuals from consulting with their lawyers to ascertain the legality of contemplated actions; it would therefore undermine the animating purpose of the privilege."). These cases rest on a doctrinal tradition—the "at issue" doctrine– that privilege is implicitly waived only when a party makes the performance of his attorney a substantive issue in the case.

The rule providing for waiver when a litigant voluntarily injects his attorney's performance into a case has no application to the matter of Lott's innocence. The "at issue" doctrine exists because it would be unfair for a defendant to assert that his attorney's conduct immunizes him from liability without allowing his adversaries to know anything about that

conduct. Thus, as a number of courts have noted, privilege cannot be used "as both a sword and a shield." See, e.g., In re Keeper of Records, 348 F.3d 16, 24 (1st Cir. 2003); In re von Bulow, 828 F.2d 94, 103 (2nd Cir. 1987).

The majority approach for analyzing issue-injection waiver originated in Hearn v. Rhay, 68 F.R.D. 574, 581 (E.D. Wash. 1975) (articulating a three-part test for determining whether a party put privileged information at issue). Courts utilizing the Hearn approach have found waiver in cases where a party asserted reliance on the advice of counsel, Conkling v. Turner, 883 F.2d 431, 434 (5th Cir. 1989); raised an affirmative defense of good faith, United States v. Bilzerian, 926 F.2d 1285, 1291-93 (2nd Cir. 1991); sought equitable tolling of the statute of limitations based on counsel's conduct, WLIG-TV Inc. v. Cablevision System Corp., 879 F. Supp. 229, 235 (E.D.N.Y. 1994); made a claim of misrepresentation, Synalloy Corp. v. Gray, 142 F.R.D. 266, 270 (D. Del. 1992); or accused an attorney of malpractice, Sedco Int'l S.A. v. Cory, 683 F.2d 1201, 1206 (8th Cir. 1982). In each of these cases, the communication between attorney and client was a critical component of the claim, and without access to the privileged communications the party's opponent would be left with no opportunity to defend against the claim.

Lott has not used his privileged information as a sword to advance his claim. Petitioner ignores the premise of the "at issue" doctrine, relying instead on the bare assertion that fishing through Lott's privileged information would advance his cause.

2.4 RELEVANCE ALONE DOES NOT JUSTIFY AN EXCEPTION TO LONGSTANDING PRIVILEGE PROTECTIONS.

Petitioner's refrain that accessing Lott's privileged material might yield information helpful to his case simply states the obvious without advancing the argument. In essence, Petitioner argues that privilege must be cast aside because (1) Lott has made innocence an issue

in the case; (2) his attorneys might know something about Lott's innocence; and (3) it could help Petitioner's case to find out what Lott's attorneys know and what is in their files.

Standing alone, the fact that opposing counsel may have relevant information for an adversary has never opened privileged information for inspection. Nonetheless, Petitioner's argument rests on the assertion that, because there might be useful facts protected by Lott's privileges, his privileges must yield. This argument flies in the face of established principles that this Court need not disturb.

As one court observed, "in every lawsuit, it would be useful and convenient for [one party] to obtain [the other's] privileged material . . . . But those are not reasons to void the attorney-client privilege." Standard Chartered Bank PLC v. Ayala Int'l Holdings (U.S.) Inc., 111 F.R.D. 76, 81 (S.D.N.Y. 1986). Another court aptly noted: "While it would no doubt provide a tremendous tactical advantage to an adversary to be able to pry into the 'mental impressions, conclusions, opinions, or legal theories of an attorney or other representative of a party concerning the litigation,' Fed. R. Civ. P. 26(b)(3), a competent adversary will never need access to such [work-product] information in order to prepare and present his or her case effectively." KW Muth Co. v. Bing-Lear Mfg. Group, 219 F.R.D. 554, 565-66 (E.D. Mich. 2003) (quoting Fleet Nat'l Bank v. Tonneson & Co., 150 F.R.D. 10, 14-15 (D. Mass. 1993).

Unless a party uses privileged information as a sword to advance a claim – which Lott has not done – then the privilege remains a shield to his adversary's discovery requests no matter whether the protected information would be relevant. Bilzerian, 926 F.2d at 1292. And as the Sixth Circuit put it: "[W]hile the sword stays sheathed, the privilege stands." Petitioner's App. p. 14.

Petitioner assumes, as did the district court in the discovery order corrected by the Sixth Circuit, that the relevance of the evidence sought is dispositive on the issue of implied waiver. But as other courts have uniformly maintained:

> Relevance is not the standard for determining whether or not evidence should be protected from disclosure as privileged, and that remains the case even if one might conclude the facts to be disclosed are vital, highly probative, directly relevant or even go to the heart of an issue.
>
> As the attorney client privilege is intended to assure a client that he or she can consult with counsel in confidence, finding that confidentiality may be waived depending on the relevance of the communication completely undermines the interest to be served.

Rhone-Poulenc Rorer Inc. v. Home Indem. Co., 32 F.3d 851, 864 (3rd Cir. 1994); accord THK America, Inc. v. NSK, Ltd., 917 F. Supp. 563, 567 (N.D. Ill. 1996) ("[T]he attorney-client privilege applies even when attorneys' opinions are relevant."); High Tech Commc'ns, Inc. v. Panasonic Co., 1995-1 Trade Cas. (CCH) ¶ 70,976, at 74,494 (E.D. La. 1995) ("[A]n otherwise privileged communication is not discoverable merely because it discloses facts relevant to the litigation."). These holdings are consistent with the policy goals guiding the law of privilege because "[a]ny inequity in terms of access to information is the price the system pays to maintain the integrity of the privilege." Admiral Ins. Co. v. United States Dist. Ct., 881 F.2d 1486, 1494 (9th Cir. 1989).

Under Petitioner's reasoning, the scenarios where lawyers could be forced to disclose otherwise confidential client communications are as broad as the concept of what constitutes relevant evidence. The mere fact that a client's communications with his attorney might contain information relevant to the claims being litigated has never been sufficient to cause a waiver of the attorney-client privilege. To the contrary, those communications regarding the subject of the litigation are precisely what the attorney-client privilege and the work-product doctrine are designed to protect.

2.5 WORK-PRODUCT PROTECTED INFORMATION MAY BE ACCESSED ONLY IN NARROW CIRCUMSTANCES, NONE OF WHICH APPLIES HERE.

Lott's trial and post-conviction counsels' files are work product that is protected from disclosure to his adversary by the work-product doctrine.

The work-product doctrine is governed by a uniform federal standard set forth in Fed. R. Civ. P. 26(b)(3) – a Rule never mentioned in the discovery order or Petitioner's petition for certiorari. This Rule shelters the mental processes of the attorney, providing a privileged area within which he can analyze and prepare his client's case." United States v. Nobles, 422 U.S. 225, 238 & n.11 (1975). Under Rule 26(b)(3), the work-product doctrine applies to "documents and tangible things ... prepared in anticipation of litigation or for trial by or for another party or by or for that other party's representative (including the other party's attorney, consultant, surety, indemnitor, insurer, or agent)...." Fed. R. Civ. P. 26(b)(3). It is therefore necessary that "the [work-product] doctrine protect materials prepared by agents of the attorney as well as those prepared by the attorney himself." Nobles, 422 U.S. at 238-39.

Under the work-product doctrine, a party seeking to obtain work-product materials must undertake several steps to justify before such protection is disregarded. Toledo Edison Co. v. G A Technologies, Inc., 847 F.2d 335 (6th Cir. 1988). First, the party seeking discovery bears the burden of showing that "the materials requested are 'relevant to the subject matter involved in the pending litigation' and not privileged." Toledo Edison, 847 F.2d at 339. Then, the party opposing discovery must show that the requested materials were "prepared in anticipation of litigation or for trial." Id. Once the materials have been shown to be work product:

> the burden shifts back to the requesting party to show that the requesting party (a) has substantial need of the materials in preparation of the party's case, and (b) that the party is unable without undue hardship to obtain the substantial equivalent of the materials by other means. In doing this, attention is directed at alternative means of acquiring the information that are less intrusive to the

> lawyer's work and whether or not the information might have been furnished in other ways.

Id. Even if the party seeking discovery can meet the "substantial need" and "undue hardship" tests, they still cannot access "opinion" work product, once the objecting party shows that the requested materials are the "mental impressions, conclusions, opinions or legal theories of an attorney or representative." Id.

Were Petitioner required to comply with these tests, he could not get around the obvious fact that documents recording client communications are privileged. The rest of the documents in prior counsels' files are work-product assembled in anticipation of trial and litigation.

Petitioner did not and cannot prove that he has a substantial need for Lott's work-product, or that he would suffer undue hardship without it. Petitioner has the alternate means of defending against Lott's claim by using the evidence presented at trial to counter Lott's claim. What Petitioner cannot do now, though, is deny the impact of the evidence hidden by the State at trial. No doubt that makes Petitioner's job difficult, but that hardly amounts to the type of "need" and "hardship" that justifies giving him copies of Lott's trial and post-conviction counsels' files.

2.6 PETITIONER'S "FLOODGATES" ARGUMENT OPENS THE OTHER WAY – IF NEW PRIVILEGE EXCEPTIONS ARE RECOGNIZED HERE, THEY WILL CUT INROADS ACROSS THE LEGAL LANDSCAPE.

Petitioner worries that the Sixth Circuit decision will open the floodgates for frivolous innocence claims. That is wrong for several reasons, not the least of which is the fact that the Sixth Circuit simply enforced existing law, and under existing law, the courts have not seen a flood of frivolous innocence claims before or after Schlup.

However, a legitimate worry is that Petitioner's arguments threaten a flood of discovery claims in all cases where a litigant can claim one might find useful information in opposing counsel's files, or by deposing opposing counsel.

The principles of privilege law do not allow Petitioner to ask for just one small exception in circumstances only like those presented here. Privileges cannot be respected only for some cases, and completely abandoned in others. As the Sixth Circuit said: "If we intend to serve the interests of justice by encouraging consultation with counsel free from the apprehension of disclosure, then courts must work to delineate the scope of the privilege in ways that are predictable and certain." Petitioner's App. p. 7.

Moreover, there is no principled way to distinguish Petitioner's arguments from applying to all other privileges long recognized in our justice system. As the Sixth Circuit noted:

> If the attorney-client privilege should fail due to the assertion of innocence by a man who has confessed to his attorney, it is difficult to conceive why the privilege determination would be different for a criminal defendant who pleads not guilty. ... The focus on actual innocence "does not modify the essential meaning of 'innocence.'" Schlup, 513 U.S.at 328 (noting that it is firmly established that "the line between innocence and guilt is drawn with reference to a reasonable doubt"). The fact that the habeas petitioner is proceeding in civil rather than criminal court and now bears the burden of proof is largely insignificant to the rules of privilege. Swidler & Berlin v. United States, 524 U.S. 399, 408-09 (1998) ("[T]here is no case authority for the proposition that the privilege applies differently in criminal and civil cases.").

Petitioner's App. pp. 17-18.

The fact that the defendant at trial is in a defensive stance at trial and in an affirmative stance in habeas, where he bears the burden of proof, makes no material difference in Petitioner's "relevancy" argument. Many individuals who plead not guilty at arraignment are in fact guilty, and deposing their attorneys and reviewing counsel's files may well help the prosecution counter that plea at trial. And even if a not guilty plea did not trigger Petitioner's

logic, it seems certain to apply when a criminal defendant raises an affirmative defense. When the defendant bears the burden, the prosecution would find support for piercing privilege in Petitioner's theory that privilege is pierced when it is possible opposing counsel may know of facts that weaken his client's position, but which are not otherwise subject to disclosure. It would be anathema to our system of adversarial justice to allow a prosecuting attorney to essentially deputize a defendant's counsel. Petitioner's argument invites just such an outcome – one that threatens to convert our adversarial system into an inquisitional system without any privileges.

Habeas respondents defend trial level convictions. If this Court gives the government the right to pierce privilege in habeas litigation because it might find facts helpful to sustain a conviction, then defense lawyers at trial will surely argue that they are entitled to pierce the prosecution's privileges to find facts that might help avoid an unwarranted conviction.

This case cannot be distinguished from civil cases more generally, where it is common for litigants to assert that their positions are factually truthful. Opponents in such cases would no doubt ask for discovery on the theory that opposing counsel may have inside information helpful for determining the truth of the matter asserted. Under Petitioner's argument, any civil litigant averring a fact would implicitly waive privilege to the extent necessary for his adversary to defend the claim by accessing privileged information. It would, after all, always be helpful to know whether your adversary had contradicted himself to his attorney.

If Petitioner's logic is embraced, transactional attorneys can be haled into court when the true meaning of a contractual agreement is needed; litigators can be deposed when class-action plaintiffs want to know how product liability defendants described their predicaments to their lawyers; and nothing will be sacred when defamation defendants raise the affirmative defense of

truth. Or consider a breach of contract claim, where one of the parties disputes that there was a meeting of the minds. In search of relevant evidence, could each party depose opposing counsel in an attempt to fish for statements made by the attorney's client that are inconsistent with that party's position?

The precise reach of Petitioner's argument cannot be divined. But this much is certain: were this Court to adopt Petitioner's argument, the decision would show up in any number of cases where one party wants to see an opponent's privileged material. As the Sixth Circuit observed:

> Permitting this order to stand would place in jeopardy not only the attorney-client privilege, but also other important privileges such as the privilege between husband and wife, the privilege between patient and psychiatrist, or even the privilege between the penitent and their clergy. Since there is no linkage between the implied waiver ruling and the nature of the privileged relationship, there would be no logical reason to limit the ruling solely to the attorney-client relationship.

Petitioner's App. p. 17.

This Court should leave undisturbed the Sixth Circuit's conclusion that Petitioner has no basis for piercing Lott's privileges.

CONCLUSION.

The Court should deny Petitioner's petition for certiorari.

Respectfully submitted,

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No. 05-962

In the Supreme Court of the United States

MARC HOUK, Warden,

Petitioner,

v.

GREGORY LOTT, *et al.*,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

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TABLE OF CONTENTS

Page

TABLE OF CONTENTS i

TABLE OF AUTHORITIES ii

INTRODUCTION 1

A. The unique nature of actual innocence claims necessarily alters the usual rules of evidentiary admissibility, including the scope of the claimant's otherwise applicable privileges 2

B. The extraordinary nature of an actual innocence claim ensures that a claimant's implied waiver of the attorney-client and work-product privileges will not erode the privilege in other areas of the law. 8

C. Review is needed here because States and federal habeas petitioners need to know the ramifications of an actual innocence claim for the claimant's attorney-client and work-product privileges. 9

CONCLUSION 10

TABLE OF AUTHORITIES

Cases **Page(s)**

Bousley v. United States,
523 U.S. 614 (1998) 2, 5

Brady v. Maryland,
373 U.S. 83 (1963) 3, 5

Doe v. Menefee,
391 F.3d 147 (2d Cir. 2004) 5

Hamilton v. Miller,
292 F. Supp. 2d 437 (E.D.N.Y. 2003) 5

Herrera v. Collins,
506 U.S. 390 (1993) 3, 4, 9

House v. Bell,
386 F.3d 668 (6th Cir. 2004) 6

Pamida, Inc. v. E.S. Originals, Inc.,
281 F.3d 726 (8th Cir. 2002) 7

Sawyer v. Whitley,
505 U.S. 333 (1992) 9

Schlup v. Delo,
513 U.S. 298 (1995) ..... *passim*

Rules

Fed. R. Civ. P. 26(b) 7

INTRODUCTION

The petition showed that the decision below merits immediate review for four reasons. First, the decision below, which categorically forecloses implied waiver of an "actual innocence" claimant's attorney-client and work-product privileges, is inconsistent with the Court's admonition that a court entertaining an "actual innocence" claim must consider it "in light of all the evidence" relevant to the claimant's guilt or innocence. *Schlup v. Delo*, 513 U.S. 298, 328 (1995). Second, the Sixth Circuit's ruling permits habeas petitioners who are asserting actual innocence claims to hide the most relevant evidence regarding their innocence. Third, the ruling threatens to undermine the finality of state convictions, as it increases the likelihood that a petitioner who is actually guilty could successfully claim actual innocence. Finally, the ruling below muddies the law of implied waiver of attorney-client privilege, as case law suggests that an implied waiver of privilege is appropriate where a claimant has directly put privileged material at issue by his contentions—but the decision below disagrees.

Lott fails to respond meaningfully to any of these concerns. Instead, his argument proceeds from the flawed assumption that this is an ordinary, run-of-the-mill habeas claim. But it is not. Rather, as the petition showed, an actual innocence claim, to the extent it even exists in the context in which Lott asserts it, is unique in all of habeas jurisprudence. Far from merely asking whether a defendant is being held in violation of the Constitution—the typical habeas inquiry—an actual innocence claim requires a searching review of "all" the available evidence to determine the claimant's innocence. Accordingly, the State ought to have access to the most relevant evidence pertaining to that inquiry.

The unique nature of an actual innocence claim also forecloses Lott's argument that recognizing an implied waiver of the attorney-client and work-product privileges

here would undermine evidentiary privileges elsewhere. It is only because of the extraordinary nature of the claim that the ordinary limitations on evidence admissibility are put aside. Thus, the waiver analysis is inherently self-limiting.

In any event, whether or not Ohio is correct on the merits, review is desperately needed here because States and habeas petitioners alike need to know the ramifications that an actual innocence claim holds for the claimant's attorney-client and work-product privileges. In particular, both groups of litigants need to know what a review of "all the evidence" regarding the claimant's factual innocence entails.

For the above reasons and those in the petition, Ohio urges the Court to review this case.

A. The unique nature of actual innocence claims necessarily alters the usual rules of evidentiary admissibility, including the scope of the claimant's otherwise applicable privileges.

1. As the petition showed, an implied waiver of an actual innocence claimant's attorney-client and work-product privileges is appropriate because of the unique way that an actual innocence claim works as a means to overcome a final conviction and sentence. Ohio Pet. at 17–24. Unlike a criminal defendant before trial, who is presumed innocent, an actual innocence claimant like Lott comes before the habeas court with at least a "strong," if not conclusive, presumption of guilt. *Schlup*, 513 U.S. at 326 n.42. The inquiry focuses on the claimant's factual innocence, as opposed to "mere legal insufficiency." *Bousley v. United States*, 523 U.S. 614, 623 (1998). Courts entertaining such claims must consider "all the evidence" relevant to the claimant's factual innocence. *Schlup*, 513 U.S. at 328; *Bousley*, 523 U.S. at 623–24. In pursuing such extraordinary relief, claimants should not be permitted to rely on their best evidence of innocence while they simultaneously hide the evidence most relevant to their specific contentions.

In response, Lott fails to come to terms with the extraordinary nature of an actual innocence claim and its corresponding alteration of the usual litigation rules about the evidence that may be considered.[1] Lott attempts to minimize *Schlup*'s abridgement of the usual rules of evidentiary admissibility, noting that the Court there did not hold that an actual innocence claimant waives the attorney-client privilege. Lott Opp. at 9–11. Although the Court in *Schlup* did not expressly address the issue of implied waiver of a claimant's privilege, the Court then did not need to do so. But the Court's admonition to consider "all the evidence" relevant to a petitioner's factual guilt or innocence does not exclude—and, fairly read, encompasses—the claimant's relevant privileged material. *Schlup*, 513 U.S. at 327–28; see also Pet. App. at 22a–24a (Boggs, C.J., dissenting).

Thus, when a petitioner asserts his factual innocence as a sword to strike down his otherwise final conviction or sentence, he should not be able simultaneously to shield privileged material that relates directly to his contentions in

---

[1] While all actual innocence claims are extraordinary, Lott's claim is especially complicated, because he apparently seeks to create a new type of "innocence" claim—i.e., a type never recognized by any court. Lott insists that his claim is not a free-standing innocence claim of the type discussed in dicta in *Herrera v. Collins*, 506 U.S. 390, 417 (1993), see Lott Opp. at 5. Instead, Lott's second habeas petition and other supporting papers filed in the district court indicate that Lott seeks to create some sort of hybrid *Schlup* claim, which does not exist. In his application to file a second habeas petition, at page 3, Lott insisted that he had not raised an actual innocence claim in his first habeas petition, either as a "free-standing" claim or as a gateway to excuse the defaulted claim under *Brady v. Maryland*, 373 U.S. 83 (1963). But Chief Judge Boggs disputed that point when he dissented from the order granting Lott permission to file his second habeas petition. See Pet App. at 89a (objecting that "Lott briefed his *Brady* and actual innocence claims in his first appeal of the habeas denial to this court"); Ohio Pet. at 20 n.2. While Ohio disputes that a free-standing innocence claim, or a hybrid *Schlup* claim of the sort Lott asserts here, even exists, Ohio must defend against Lott's amorphous claim in his second habeas petition. Ohio sought the discovery below for that purpose.

support of that claim. To hold otherwise would prevent the State from defending the judgment against a claimant's new factual contentions, which, as here, are often asserted many years after the original criminal trial.

In the end, the parties' dispute over privilege centers primarily, if not wholly, on our dispute over whether an actual innocence claim is, indeed, a sword that gives special benefits to a habeas petitioner. That is so because Lott admits, as he must, the abstract principle that criminal defendants cannot have it both ways by using swords as shields. In particular, he notes that, where ineffective-counsel claims are raised, "it would be unfair for a defendant to assert that his attorney's conduct immunizes him from liability without allowing his adversaries to know anything about that conduct." Lott Opp. at 13–14. But Lott insists that an actual innocence claim is different, such that it does not have the same effect.

To be sure, a *Schlup*-style actual innocence claim may differ from an ineffective counsel claim in that a *Schlup*-type claim triggers a procedural benefit, and not a substantive right to habeas relief—but both claims are undoubtedly similar in that each gives a claimant an affirmative benefit, or sword, and not just a defensive benefit, or shield. A claimant who has exhausted and defaulted all claims, and has no other basis for a successive petition, can invoke actual innocence to obtain the right to have his new claims reviewed. Surely that is a sword-style benefit—so it must have the same effect.

And an innocence claim is even more like an ineffectiveness claim when that claim is asserted as a basis for substantive relief and not just for procedural advantage. And that is the case for so-called *Herrera* claims, if they exist. More important, Lott's newly minted claim is one for substantive relief, as he asserts that "[u]nlike *Schlup*, Lott advances a *substantive* claim for relief based on proof of his actual innocence that lies in facts that were withheld in

violation of *Brady*." Lott Mandamus Pet. at 20 (emphasis added); cf. *id.* ("[Lott] is not simply arguing that *Schlup*'s gateway permits this Court to address the merits of a *Brady* claim.").

2. For similar reasons, Lott is surely wrong when he suggests that only evidence supporting his innocence claim may be considered in determining his actual innocence. See Lott Opp. at 12 ("The analytical focus should fall on the question whether, in light of the *Brady* evidence of innocence, any reasonable factfinder would have found Lott guilty of the underlying offense."). Indeed, in the courts below, Lott suggested that he was not required to show his factual innocence, notwithstanding the Court's cases so holding. See Lott's Sur-Reply to Petitioner's Traverse at 1–2 (suggesting that the question for review was different from whether Lott has proven that he is in fact innocent); Ohio Pet. at 20 n.2. Lott's views in this regard cannot be squared with *Schlup*'s all-the-evidence mandate, 513 U.S. at 328, or *Bousley*'s reiteration that the focus of such review is on the claimant's factual innocence, 523 U.S. at 623–24. See also Ohio Pet. at 20 n.2.

3. Lott's position here is also rooted in his apparent, but erroneous, belief that a court entertaining an actual innocence claim should not consider evidence obtained by the State after a petitioner's conviction. See Lott Opp. at 11 ("While *Doe* [*v. Menefee*, 391 F.3d 147 (2d Cir. 2004)] and *Hamilton* [*v. Miller*, 292 F. Supp. 2d 437 (E.D.N.Y. 2003)] sanctioned the use of evidence that may not have been admissible at trial, neither court relied on any evidence that had been obtained by the State after the petitioner had been convicted . . . ."). But that view is surely mistaken, as both the majority and dissenting opinions in *Bousley* demonstrate. See 523 U.S. at 624 ("[t]he Government is not limited to the existing record to rebut any showing that petitioner might make."); cf. *id.* at 631 (Scalia, J., dissenting) ("As the Court's opinion today makes clear, . . . the Government is permitted to

supplement the trial record with any additional evidence of guilt . . . and [if Bousley introduces evidence showing that he did not "use" a firearm in committing the crime,] *the Government, eight years after the fact, will have to find and produce witnesses saying that he did.*") (emphasis added). See also, e.g., *House v. Bell*, 386 F.3d 668, 681 (6th Cir. 2004), *cert. granted on other grounds*, 125 S.Ct. 2991 (2005) (detailing evidentiary-hearing testimony of the state's blood expert, not presented at the original criminal trial, offered to refute the petitioner's exculpatory theory).

4. Curiously, Lott erroneously contends that States will not be prejudiced by lack of access to an actual innocence claimant's privileged material bearing directly upon a claimant's contentions, because States will have the trial record and other pre-conviction evidence upon which to rely. Lott Opp. at 8. Once again, Lott's contention misapprehends the extraordinary nature of the claim he asserts. An actual innocence claim goes beyond the usual litigation rules and ordinary judicial remedies, as a last-ditch effort to undo a conviction and sentence on the basis that the claimant is entirely innocent as a factual matter.

In this case, apart from the evidence of Lott's guilt in the trial record, Lott's confession to a police detective would undermine his innocence claim. But Lott now asserts that he never confessed at all. Consequently, in pressing his innocence claim, Lott should not be permitted to hide any privileged material that is relevant to his recent contention that his confession was totally fabricated and that he never admitted his guilt. If Lott is permitted to do just that, the State will be prejudiced in defending Lott's conviction against his *new* claim, as the trial record does not contain Lott's confession. It was suppressed on Sixth Amendment grounds.

And, as Lott has impliedly waived the attorney-client and work-product privileges, Federal Rule of Civil Procedure

26(b) does not bar production of his former lawyer's documents relating to the issue of whether or not Lott confessed to his role in the crime. See *Pamida, Inc. v. E.S. Originals, Inc.*, 281 F.3d 726, 731–32 (8th Cir. 2002) ("Because we find that [claimant] has waived the work product privilege in this case, we need not address whether the Rule 26(b)(3) standard of substantial need an undue hardship has been shown by [opponent]."). Cf. Lott. Opp. at 17–18.

Equally important, Lott's argument about no harm to the State misses the point that this litigation itself is a harm to the State, and the same will be true in similar cases—hence the need for review here. That is, the State pays a cost, both in finality and in actual litigation costs, when it is forced to defend against actual innocence claims, even if it wins them all. And the decision below will likely increase the frequency of such claims, as it allows inmates to claim innocence while hiding contrary evidence. Once inmates know that *all* the evidence will be put on the table, the gain from bogus claims will be lessened, and thus their frequency will fall. Meanwhile, those rare, truly innocent claimants will have nothing to fear from a true all-the-evidence regime.

5. Finally, Lott misses the point when he stresses the importance of the attorney-client privilege in the adversary system generally and noting that implied waivers ordinarily are narrowly construed. See Lott Opp. at 6–7, 12–16. The Warden does not disagree that the attorney-client and work-product privileges serve important roles in the adversary system, or that courts generally are chary of broad implied waivers of the privilege. But in the context of an actual innocence claim, the habeas petitioner seeks to overturn an otherwise final conviction and sentence based on his contention that he is "entirely innocent," so his incarceration (or execution) would work a "fundamental miscarriage of justice." *Schlup*, 513 U.S. at 324–25. As the dissenting judge below observed, "[f]or a petitioner to show he is entirely

innocent, and that he is truly deserving of extraordinary relief, one would think that [the petitioner] must be willing to test his innocence against literally all the evidence, including whatever is protected by privilege." Pet. App. at 24a (Boggs, C.J., dissenting).

B. The extraordinary nature of an actual innocence claim ensures that a claimant's implied waiver of the attorney-client and work-product privileges will not erode the privilege in other areas of the law.

Lott's concern that an implied waiver of privilege by an actual innocence claimant would undermine the attorney-client privilege in other litigation, civil and criminal, is misplaced. See Lott Opp. at 19–21. As explained above (at 2), an actual innocence claim is unique in judicial proceedings. As the dissent below recognized, a "claim of actual innocence thus places unique demands on the attorney-client privilege, based on values that do not transfer to other areas of law." Pet. App. at 27a (Boggs, C.J., dissenting). Actual innocence claims invoke a form a judicial clemency, a world in which the typical litigation rules are set aside in a quest for some ultimate justice.

Consequently, Lott is mistaken in suggesting that recognizing an implied waiver here would imperil the privilege in civil cases outside of federal habeas actual innocence claims. Lott points to no other civil claim where the governing law directs the court entertaining the claim to consider "all the evidence"—including evidence that would be inadmissible at trial, and evidence that is claimed to have been obtained in an unconstitutional manner.

Nor is Lott on solid ground when he asserts that implied waiver of privilege for an actual innocence *habeas* claim would jeopardize the privilege for criminal defendants at trial. See Lott Opp. at 19–20. Nothing in *Schlup* or the Court's other cases discussing actual innocence claims suggests that the extraordinary remedy and mode of analysis

described in those cases would apply outside of that limited context. Cf. 513 U.S. at 324–25 (in asserting an actual innocence claim, petitioner argues that he is "entirely innocent," and thus it would be a "fundamental miscarriage of justice" for him to continue to be incarcerated notwithstanding his otherwise-final conviction); *Sawyer v. Whitley*, 505 U.S. 333, 335 (1992) (considering claim that petitioner was "actually innocent of the death penalty"); *Herrera*, 506 U.S. at 417 (1993) (assuming, without deciding, that a free-standing actual innocence claim might exist).

The prospect of an implied waiver of the privilege in the limited actual-innocence-habeas-claim context also would not undermine the purposes of the privilege for criminal defendants at trial. As Judge Boggs noted in his dissent below, "[i]t frankly blinks at reality to believe that a criminal defendant will be less candid with his attorney because of his possible assertion of a claim that would likely only be raised after conviction, a full course of appeals in the .ate courts, post-conviction review in the state courts, and federal habeas review." Pet. App. at 28a.

C. Review is needed here because States and federal habeas petitioners need to know the ramifications of an actual innocence claim for the claimant's attorney-client and work-product privileges.

At bottom, while Lott maintains that the Sixth Circuit decision below got it right on the merits, he does not seriously dispute that the issue raised in the petition—namely, the effect of an actual innocence claim on the claimant's attorney-client and work-product privileges—is an important one for both States and federal habeas petitioners. As actual innocence claims become more frequent in federal habeas, States and would-be claimants need to know the parameters of the *Schlup*-mandated review of "all the evidence" regarding a claimant's factual innocence.